No. 2437.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

UTAH IMPLEMENT-VEHICLE COMPANY, A CORPORATION,
Appellee,

vs.

D. W. STANDROD & COMPANY, A CORPORATION, AS TRUSTEE FOR IDAHO LUMBER COMPANY, LTD., AND GEO. A. LOWE COMPANY,
Appellant.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

Appeal from the United States District Court for the District of Idaho, Eastern Division.

CLENCY ST. CLAIR,
CHARLES C. ST. CLAIR,
Attorneys for Appellee.

Filed....., 1915

.....Clerk.

REGISTER PTG. AND PUB. CO. IDAHO FALLS.

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I.

As appears by the Statement of Facts contained in the Motion to Dismiss the Appeal herein, the appellant, D. W. Standrod & Company, as Trustee, accepted the amount awarded to it, as Trustee, for all of its beneficiaries, by the decree in this action, out of the proceeds of the sale of the property upon which it was given a lien, and it, therefore, cannot appeal from such judgment and thereby seek to set aside the judgment under which it has received the benefits. This is a well settled principle of law.

C. Y. C. Title, "Appeal and Error." Volume 2, page 651, Sub-div. "E", and page 652, Sub-div. "B".

Webster-Glover &c Co. vs. St. Croix County, 36 N. W. 864 (Wis.).

Male vs. Harlan, 82 NW Rep. 179, (S. D.Q.

State vs. Central Pac. R. Co. 26 Pac. Rep. 225 (Nev.).

Bechtel vs. Evans, 10 Idaho, 147.

Kansas City &c Co. vs. Murray, 47 Pac. Rep. 835 (Kan.).

While there is an exception to the above, it applies only to cases where the party appealing is absolutely entitled to what has been received under the decree and cannot in the event of the reversal of the judgment in any event fail to be entitled to receive what has been awarded by the decree. That exception does not apply to this case for the reason that the pleadings in this case do not concede that any amount whatever was due to D. W. Standrod & Company, as Trustee. While it is conceded by the

pleadings that such Trustee was entitled to be subrogated to the lien of the Rodgers mortgage, still the pleadings denied that there was anything due thereon. It is also conceded by the pleadings that under the Rodgers mortgage they would be entitled to an attorney's fee if there was anything due thereon, still the Court below allowed an attorney's fee of three hundred dollars ($300.00), while the plaintiff denied that any greater amount than one hundred fifty dollars ($150.00) was a reasonable attorney's fee. The tax payments recovered by the Trustee are also denied by the pleadings.

There can be no question but that if the contention of the appellant in this case be found correct as to the mechanic's liens being entitled to priority over the plaintiff's mortgage, D. W. Standrod & Company, as Trustee, should not have been awarded a lien at all upon the property, but the decree in that event should have awarded plaintiff a lien subject to the sheriff's sale for such liens, and dismissed the defendant D. W. Standrod & Company, as Trustee. In the event that the judgment in this case should be reversed, the effect of such reversal would be to vacate the sale made by the master under the decree in this case, and in that event the purchaser, Utah Implement-Vehicle Company, would be entitled to a return of the money paid by it which is now in the hands of D. W. Standrod & Company, as Trustee, and D. W. Standrod & Company, as Trustee, would have to return the money now in its hands to the clerk to be paid to the plaintiff, which, of course, is inconsistent with the idea that D. W. Standrod & Company, as Trustee, would in any event be entitled to the money which it has received under the decree in this case.

The following authorities hold that in the event of reversal of a judgment a party must restore any advantage obtained by the judgment, and that if there has been a

sale of the property, must restore the property, the sale not passing legal title until there is a deed:

Reynolds vs. Harris, 14 Calif. 667.

C. Y. C. Volume 24, page 39, Title, "Judicial Sales," Sub-div. "4".

C. Y. C. Volume 24, page 66, Title, "Judicial Sales," Sub-div. "6", Notes 78 and 80.

II.

As we understand, the rule is, that one of several defendants cannot appeal from the judgment unless a severance is granted by the trial Court. We find no authority for a defendant who is such as the representative of others being allowed a severance as to those whom it represents. In this case, D. W. Standrod & Company filed a joint pleading as Trustee for all of those for whom it is Trustee, it holding title to a sale certificate of the property as such Trustee and it obtaining a decree of the Court in its favor as Trustee for all. To allow it to appeal for a part only of those for whom it acts, leaves unrepresented in this action the others. It must be assumed that there is a difference of interests under the trust, as part of the beneficiaries refuse to join in the appeal, and, therefore, it must be assumed that those refusing to appeal are satisfied with the judgment and interested in allowing it to stand. The Trustee is, by its attempted appeal, acting partly for the interests of its beneficiaries and partly not. The beneficiaries for whom this appeal is not prosecuted, being E. E. Rodgers and F. C. Rodgers, cannot be heard on this appeal, as they were not parties to the action in the lower Court and are not parties to this appeal. We submit that D. W. Standrod & Company, as Trustee, must appeal for all of those for whom it acts or it cannot appeal at all.

III.

We do not understand that it is sufficient to obtain a severance as to a defendant and thereafter in the appeal ignore such other defendant, but we contend and believe that if a severance is granted, there must be a citation and notice to the defendant not appealing in order to make the appeal effective.

The defendant Bowman, Trustee, represents the estate of the bankrupt Mickelson, who was personally liable upon plaintiff's notes. If the judgment herein should be reversed, and thereby the sale of the property vacated, the liability of the bankrupt estate would be affected as the property might, on a re-sale, bring a smaller price. The Supreme Court of Idaho has held that a person liable for deficiency is a necessary party to an appeal seeking to set aside a foreclosure sale.

Miller vs. Wallace, 143 Pac. 524 (Idaho).

The defendant Bowman, as Trustee of the bankrupt estate, is directly interested in the question involved in this appeal by the ninth assignment of error as to the denial by the trial Court of the relief asked by the supplemental pleading of D. W. Standrod & Company, as Trustee.

Respectfully submitted,

CLENCY ST. CLAIR,
CHARLES C. ST. CLAIR,
Attorneys for Appellee,
Utah Implement-Vehicle Company.